United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

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74-2189

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2189

JOHN WINSTON ONO LENNON,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), John Winston Ono Lennon ("Lennon") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on July 10, 1974. The order dismissed an appeal from a decision and order of an Immigration Judge which found Lennon deportable as an overstay visitor under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2). The decision further denied Lennon's application for adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255, on the ground that Lennon is ineligible for adjustment of status since he is inadmissible to the United States under Section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23), by virtue of his conviction on November 28, 1968 for possession of *cannabis resin* in violation of the Dangerous Drugs Act of 1965 of Great Britain.

Statement of the Facts

John Winston Ono Lennon is a thirty-five year old alien, a native and citizen of Great Britain. On November 28, 1968 Lennon pleaded guilty in the Marylebone Magistrate's Court, London, England to a charge of having a dangerous drug, *cannabis resin*, in his possession without being duly authorized, in violation of the Dangerous Drugs Act of 1965 and the regulations issued thereunder.

Subsequent to his conviction, Lennon made several entries into the United States as a nonimmigrant. On each occasion his statutory ineligibility for a visa under Section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23), was waived pursuant to Section 212(d)(3)(A) of the Act, 8 U.S.C. § 1182(d)(3)(A), which permitted him to be temporarily admitted to the United States as a nonimmigrant. On several occasions Lennon was granted an extension of his temporary stay and departed from the United States at the expiration of his authorized stay.

In July 1971 Lennon again applied for a nonimmigrant visa, was found ineligible for such visa on account of the 1968 conviction and applied for and received a waiver of inadmissibility (T. 74).* On August 13, 1971 Lennon and his wife were admitted to the United States as nonimmigrant visitors for pleasure authorized to remain until September 24, 1971. On September 24, 1971 the Service granted the Lennons an extension of their temporary stay until November 30, 1971 and again on November 29, 1971 granted a further extension to January 31, 1972. Each of these extensions was requested and granted on the basis of custody proceedings instituted in United States courts by the Lennons to obtain custody of Mrs. Lennon's child by a previous marriage.

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* References preceded by the letter "T" are to the tabs affixed to the certified administrative record previously filed with the Court.

On January 17, 1972 Lennon's status was adjusted from that of a nonimmigrant visitor for pleasure to that of a temporary worker of distinguished merit and ability so that Lennon could tape several appearances as the guest host of a television show. On February 1, 1972 Lennon's status was readjusted to that of a nonimmigrant visitor for pleasure and his authorized stay was extended to February 29, 1972. Lennon failed to depart by February 29, 1972 and did not seek any further extensions of his authorized stay.

On March 1, 1972 the Service notified Lennon that his authorized stay had expired and that if he failed to voluntarily depart from the United States by March 15, 1972 deportation proceedings would be instituted against him (T. 85). On March 3, 1972 Lennon and his wife filed applications for third preference immigrant status under Section 203(a)(3) of the Act, 8 U.S.C. § 1203(a)(3). The applications, which were subsequently approved on May 2, 1972, were based on the Lennons' outstanding ability as artists and the approval of the applications would ease the way for them to obtain immigrant visas. On March 6, 1972 the Service revoked the privilege of voluntary departure accorded Lennon on March 1, 1972 (T. 84) and instituted deportation proceedings against him by the issuance of an Order to Show Cause and Notice of Hearing (T. 92). Lennon was charged with being deportable as an overstay visitor (T. 87). Prior to the actual commencement of the deportation hearing, the District Director of the Service denied Lennon's motion to terminate the deportation proceedings as having been improvidently begun (T. 91).

On May 12, 1972, during the course of the deportation proceedings, Lennon applied for adjustment of his status to that of a lawful permanent resident pursuant to Section 245 of the Act, 8 U.S.C. § 1255 (T. 82). In ruling on Lennon's application, the Immigration Judge was confronted by Lennon's admission that he had been convicted on November 28, 1968 in the Marylebone Magistrate's Court in

London, England of having a dangerous drug, *cannabis resin,* in his possession without being duly authorized, in violation of Great Britain's Dangerous Drugs Act of 1965 and the regulations issued thereunder.

In a decision dated March 22, 1973 (T. 46), the Immigration Judge found Lennon deportable as charged, *i.e.,* an alien who after admission as a nonimmigrant remained in the United States for a longer time than permitted. The Immigration Judge further found Lennon to be statutorily ineligible for adjustment of status since he is inadmissible to the United States under Section 212(a)(23) of the Act as an "alien who has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . narcotic drugs or marihuana."

Lennon appealed the Immigration Judge's decision to the Board of Immigration Appeals (the "Board"). In a decision and order dated July 10, 1974 (T. 3) the Board dismissed the appeal after denying Lennon's motion to defer a decision pending the outcome of two court actions instituted in the United States District Court for the Southern District of New York. The motion to the Board presented claims of prejudgment by Service officials with respect to Lennon's applications for discretionary relief, "selective prosecution" of Lennon and requested a hearing pursuant to 18 U.S.C. § 3504 to determine whether and to what extent unlawful acts may have influenced Service determinations.* The Board found that Lennon's deport-

* One of the District Court actions instituted by Lennon involves claims of prejudgment, selective prosecution, and violations of the wiretapping laws. *Lennon* v. *United States,* 73 Civ. 4543. The Government's motion to dismiss was granted with respect to 18 U.S.C. § 3504 and denied with respect to the claims of alleged prejudgment and selective prosecution, 378 F. Supp. 39 (S.D.N.Y. 1974). The action is in discovery stages and may in fact be moot by the fact that the I.N.S. has undertaken a review of Lennon's claim to discretionary "non-priority" status, which was also the touchstone of his claim of selective prosecution.

ability under Section 241(a)(2) had been established by clear, convincing and unequivocal evidence. With respect to Lennon's application for adjustment of status, the Board found Lennon to be statutorily ineligible for such relief in view of his 1968 conviction. In reaching that conclusion, the Board found: (1) that conviction for illicit possession of *cannabis resin* under the Dangerous Drugs Act of 1965 required that the defendant had had knowledge that he possessed an illicit substance which proved to be *cannabis resin* and, thus, there was a sufficient *mens rea* to be a meaningful conviction under Section 212(a)(23) of the Act; and (2) that *cannabis resin* is marihuana within the meaning of Section 212(a)(23) of the Act.

This petition for review was filed on September 6, 1974 and Lennon's deportation stayed pursuant to Section 106 (a)(3) of the Act, 8 U.S.C. § 1105(a)(3).

Relevant Statutes

Immigration and Nationality Act, Section 103 (8 U.S.C. § 1103):

> Sec. 103. (a) The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . . He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

* * * * *

Immigration and Nationality Act, Section 212 (8 U.S.C. § 1182):

> Sec. 212. (a) Except as otherwise provided in this Act, the following classes of alien shall be excluded from admission into the United States:

* * * * *

(23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, . . .

* * * * *

Immigration and Nationality Act, Section 241 (8 U.S.C. § 1251):

Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * * *

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to Section 248, or to comply with the conditions of any such status;

* * * * *

Immigration and Nationality Act, Section 242 (8 U.S.C. § 1252):

Sec. 242 * * * * *

(b) * * * * * In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under Section 241 if such alien voluntarily departs from the United States at his own expense . . .

* * * * *

Immigration and Nationality Act, Section 245 (8 U.S.C. § 1255):

> Sec. 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

Title 18, United States Code (U.S.C.), as amended:

> § 3504. Litigation concerning sources of evidence.
>
> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States——
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
>
> * * * * *

Relevant Regulations

8 C.F.R. §2.1 Authority of the Commissioner.

> Without divesting the Attorney General of any of his powers, privileges or duties under the immigration and naturalization laws, and except as to the Board [of Immigration Appeals], there is delegated to the

Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the Act and all other laws relating to the immigration and naturalization of aliens. The Commissioner may issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General, and may redelegate any such authority to any other officer or employee of the Service.

8 C.F.R. § 103.1 Delegations of authority.

Without divesting the Commisioner of any of the powers, privileges, and duties delegated to him by the Attorney General under the immigration and naturalization laws of the United States, coextensive authority is hereby delegated to the following described officers of the Service:

* * * * *

(f) District directors.

Under the executive direction of a regional commissioner . . . the initiation of any authorized proceeding in their respective districts, and the exercise of the authorities under §§ 242.1(a), 242.2(a), and 242.7 of this chapter without regard to geographical limitations.

8 C.F.R. § 242.5 Voluntary departure prior to commencement of hearing.

(a) Authorized officers. The authority contained in Section 242(b) of the Act to permit aliens to depart voluntarily from the United States may be exercised by district directors, district officers who are in charge of investigations, officers in charge, and chief patrol agents.

(b) Application. Any alien who believes himself to be eligible for voluntary departure under Section

242(b) of the Act may apply therefor at any office of the Service any time prior to the commencement of deportation proceedings against him or, if deportation proceedings have been commenced, any time prior to the commencement of his hearing. The officers designated in paragraph (a) of this section may deny or grant the application and determine the conditions under which the alien's departure shall be effected. An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply for relief from deportation under any provision of law.

(c) Revocation. If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without notice by any district director, district officer in charge of investigations, officer in charge, or chief patrol agent.

Statement of the Issues

1. Whether petitioner, who is admittedly deportable, has been convicted of a violation of any law or regulation relating to the illicit possession of marihuana within the meaning of 8 U.S.C. § 1182(a)(23).

2. Whether the Board of Immigration Appeals erred in refusing to remand for a hearing under 18 U.S.C. § 3504.

3. Whether the Board erred in ruling that it does not have jurisdiction to examine the actions of the District Director in instituting deportation proceedings.

4. Whether petitioner's deportation violates his First and Fifth Amendment rights.

5. Whether the case should be remanded to the Board for consideration of the effect of the Rehabilitation of Offenders Act.

ARGUMENT

POINT I

Petitioner Is Statutorily Ineligible For Adjustment Of Status Under Section 245 of the Immigration And Nationality Act Since He is Inadmissible To The United States By Virtue Of His Conviction For Possession Of Cannabis Resin.

A. General Background

During the course of the deportation proceedings Lennon, who is admittedly deportable as an overstay nonimmigrant, applied for adjustment of his status to that of a permanent resident alien pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255. In order to show eligibility for adjustment of status, an alien must establish that he was inspected and admitted or paroled into the United States, that he is eligible to receive an immigrant visa, that he is admissible to the United States for permanent residence, and that an immigrant visa is immediately available. Since adjustment of status is a privilege, the alien has the burden of establishing his eligibility. 8 C.F.R. 242.17(d); *Montemuro* v. *I.N.S.*, 409 F.2d 832 (9th Cir., 1969); *Cabrera* v. *I.N.S.*, 415 F.2d 1096 (9th Cir. 1969). Lennon was found to be inadmissible to the United States for permanent residence because he was excludable under Section 212(a)(23) of the Act as one who had been convicted of violating a law relating to the illicit possession of marihuana.* On this appeal, Lennon contends that his conviction does not place him within the exclusion provision of Section 212(a)(23) because (1) the British statute under which he was convicted did not require *mens rea*, and (2) *cannabis resin* is not "marihuana" within the meaning of Section 212(a)(23).

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* There is no discretion under the Act to waive this ground of excludability and to grant such an alien an immigrant visa.

B. Petitioner's Conviction Is A Conviction Within the Meaning of Section 212(a)(23).

Petitioner contends that the British statute and regulations under which he was convicted do not require *mens rea* and, thus, he was not convicted of a violation of a law or regulation relating to the "illicit" possession of marihuana. It is submitted that such a reading of Section 212(a)(23) is not warranted. It provides, in pertinent part, that an alien who is convicted of a violation of any law or regulation relating to the illicit possession of marijuana is excludable and inadmissible. The petitioner's record of conviction establishes that he was convicted, upon his guilty plea, of having unauthorized possession of *cannabis resin* (T. 79).

While it is well-established that factual issues should be resolved in favor of the alien in deportation proceedings, the issue raised by petitioner is a legal one relating to the determination of an excludable class of aliens. It is submitted that the statute which defines the excludable class should be liberally construed when it is in the public interest to do so and would result in the exclusion of those aliens whom Congress intended to exclude. See *Boutilier* v. *I.N.S.*, 387 U.S. 118 (1966).

The fact that petitioner was convicted for unauthorized possession of *cannabis resin* on its face shows that petitioner was convicted of illicit possession. "Illicit" is usually defined as "unlawful" and there can be no question that petitioner's conviction was for "unlawful" possession.* Section 212(a)(23) contains no requirement that there be a guilty intent in possession and whether or not such guilty intent is required by the British statute is immaterial. The

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* Webster's New Twentieth Century Unabridged Dictionary (2d ed. 1960), p. 906, defines "illicit" as "not allowed by law, custom, etc.; unlawful; prohibited; unauthorized; improper."

fact of petitioner's conviction for a violation of regulations relating to the unlawful or unauthorized—and hence illicit —possession of *cannabis resin* is sufficient to place petitioner's conviction within the purview of Section 212(a)(23).*

The conviction which would render an alien inadmissible pursuant to Section 212(a)(23) can be distinguished from the conviction which would render an alien inadmissible pursuant to Section 212(a)(9). That section renders inadmissible an alien who has been convicted of a crime involving moral turpitude. In order to determine whether or not the crime of which the alien was convicted involved moral turpitude, it may be necessary to examine the foreign statute upon which the conviction is based. In order to find an alien excludable pursuant to Section 212(a)(23), however, it is only necessary to find that the alien has been convicted of violating a law or regulation relating to the illicit possession of marihuana.

In finding that Lennon's conviction did render him inadmissible under Section 212(a)(23), the Board did so on the theory that the British statute did in fact require that the element of *mens rea* be present for conviction. While such a finding is not necessary in view of the terms of Section 212(a)(23) itself, the Board's reading of the British cases is a proper one.

Relying upon the opinion of the House of Lords in *Warner* v. *Metropolitan Police Commissioner*, (1968) 2 All E.R. 356 (H.L.), the Board found that at the time of Lennon's conviction in 1968 there was a substantial knowledge requirement for conviction of possession as in-

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* There are some U.S. jurisdictions which do not require *mens rea* for conviction. See the decision of the Immigration Judge (T. 46) and the discussion therein at p. 21 *et seq.*

terpreted by the majority in the *Warner* decision. In *Warner,* the defendant's van was stopped and searched by police who found two parcels, one of which contained perfume and the other of which contained a prohibited substance. The defendant had picked up both packages at a cafe and testified that he believed both packages contained perfume. On appeal to the House of Lords the defendant argued that the trial judge had improperly instructed the jury that the defendant was guilty if he had control of the box which in fact turned out to be full of amphetamines and that his claim of lack of knowledge as to the nature of the contents of the box was to be considered only in mitigation of sentence. The House of Lords took diverse approaches to the question of the mental element necessary to convict a man of possession, with two of the justices adhering to a position of absolute liability while three of the justices believed that there was a substantial knowledge requirement for conviction of possession of a dangerous drug. Two of those in the majority, Lord Pearce and Lord Wilberforce, thought that a person could not be said to be in possession of the contents of a package if he were entirely unaware of those contents. Both justices concluded that proof that a person knowingly possessed a package raised a strong inference that he also knew the contents; however, the defendant could rebut that inference if he raised substantial doubt that he knew the contents. Lord Reid, the third justice in the majority, took the view that the statute required the prosecution to prove facts from which the jury could infer that the defendant knew that he had a prohibited drug in his possession.

The majority opinions in *Warner* with respect to the existence of a substantial knowledge requirement for conviction of possession were cited in several subsequent cases as the controlling law on the question of the mental element required for conviction of possession. *R.* v. *Marriott* (1971), 1 All E.R. 595 (C.A.); *R.* v. *Irving* (1970) Crim. L. Rev. 642; *R.* v. *Fernandez* (1970) Crim. L. Rev. 277. In *Sweet*

v. *Parsley* (1969) 1 A11 E.R. 347 (H.L.), the House of Lords again had occasion to consider the element of *mens rea* in reviewing the conviction of a landlord who had no knowledge that cannabis was being smoked on her premises but who had been convicted for being concerned in the management of premises used for the smoking of *cannabis*. The court held that the conviction should be quashed since the statute required *mens rea, i.e.* that the appellant intended or knew that the premises were to be used for smoking *cannabis*. The court recognized that *mens rea* is an essential element of every offense unless some reason can be found for holding otherwise. The court indicated that the element of *mens rea* should not be lightly dispensed with and that the mere absence of the term "knowingly" is not in and of itself sufficient to impose absolute liability.

The Board concluded that the statute under which Lennon was convicted contained a sufficient *mens rea* requirement to preclude the conviction of innocent persons and pointed out that a reading of the British cases establishes that persons who asserted plausible defenses based on lack of knowledge were successful in overturning their convictions. The fact is that petitioner waived any such available defense when he pled guilty and is bound by that plea and its consequences. To do less would be to impermissibly replace Congress' judgment with the Court's. *Cf. Oliver* v. *U.S. Dept. of Justice,* 1975 Slip. Op. 3565, 3569 (2d Cir. May 15, 1975); *Noel* v. *Chapman,* 508 F.2d 1023 (2d Cir. 1975).

C. Cannabis Resin Is Marihuana Within the Meaning of Section 212(a)(23).

In a further attempt to remove his conviction from the ambit of Section 212(a)(23), Lennon contends that *cannabis resin* is not "marihuana" within the meaning of the statute. Petitioner's contention is based upon the testimony of petitioner's expert witness who testified that *cannabis*

resin is hashish but that it is not marihuana (T. 89, p. 37). The witness testified that the term marihuana as commonly used in the United States refers only to the cut part of the *cannabis sativa* plant while the term *cannabis resin* refers only to the resin from the female plant at a time when the female begins to flower. Neither the Immigration Judge nor the Board of Immigration Appeals accepted this technical chemical distinction made by the witness. Instead, the Board looked to the intent of Congress in enacting an excludability statute based on a "marihuana" violation.

The term "marihuana" in Section 212(a)(23) is not defined in the Act, nor does the legislative history contain a clear statement as to the definition to be given the term. The legislative history does, however, set forth the purpose for which Section 212(a)(23) was amended and the probable meaning which Congress intended the term "marihuana" to have in the context of that section. The Narcotics Control Act of 1956 was specifically aimed at including possession of narcotics as a ground for excludability and deportability. The legislative history indicates that Congress believed the amendment of the immigration statute would call the exclusion and deportation provisions of the statute into question if an alien were convicted of possession of marihuana. U.S. Code Cong. & Ad. News, 84th Cong., 2d Sess. (1956), vol. 2, p. 3294, footnote 1. However, subsequent to the 1956 amendment several courts held that the term "narcotics" in the statute did not include marihuana. Consequently, in 1960 the immigration statute was amended to specifically include "marihuana" by name in the exclusion and deportation provisions relating to narcotics. The stated purpose of the 1960 amendment relating to marihuana was to confront the growing problem of drug abuse and to provide for the exclusion and deportation of aliens convicted of possession of marihuana. S. Rep. No. 1651, 86th Cong., 2d Sess. U.S. Code Cong. & Ad. News, p. 3134-35 (1960).

Prior to the 1960 amendment, Congress had enacted several other laws relating to marihuana and in each of those statutes marihuana was defined as including *cannabis resin*. 21 U.S.C. § 802(15); Act of August 16, 1954, Ch. 736, 68A Stat. 565; Act of July 18, 1956, Ch. 629, § 106, 70 Stat. 570. In addition, the United Nations Convention on Narcotic Drugs of 1961 treats *cannabis resin* as marihuana. 18 U.S. Treaty Series 14, Art. 1.

As the Board reasoned it would be illogical to construe Section 212(a)(23) as requiring the exclusion of an alien convicted for possession of marihuana but to permit the entry of an alien convicted of possession of *cannabis resin*, the more potent derivative of the *cannabis sativa* plant. Rather, the Court should construe the term "marihuana" as including *cannabis resin* in order to give effect to the legislative objective. Petitioner's proffered construction is hypertechnical and illogical and without support in the broad and inclusive statutory language. We submit that the Court should reject that strained construction and instead adopt the respondent's construction which is consistent with the legislative history and effects the Congressional purpose.

POINT II

The Board Properly Refused to Remand For a Hearing Under 18 U.S.C. § 3504.

During the pendency of petitioner's appeal to the Board, petitioner's counsel obtained an anonymous memorandum which he contends is "substantial evidence" that Lennon's deportation proceedings were politically motivated. Counsel refused to reveal the source of the memorandum to the Board (T. 14, p. 27). Petitioner contends that the memorandum provides sufficient basis for a hearing pursuant to

18 U.S.C. § 3504 to determine if there had been some illegal surveillance of petitioner.*

Section 3504 relates solely to the suppression of *evidence* obtained by the use of unlawful electronic surveillance, prohibited by the Omnibus Crime Control Act of 1970 (18 U.S.C. § 2510 *et seq.*) in any criminal or other governmental proceeding. A review of the record establishes that Lennon could not possibly claim that *evidence* of his deportability or his statutory ineligibility for adjustment of status was obtained by illegal surveillance. His deportability as an overstay was established by his own testimony and his statutory ineligibility for adjustment of status was established by a conviction record which Lennon conceded related to him. Even if petitioner could make some showing that material or information were unlawfully obtained from him, he would be unable to show that any such information was in any way relevant to the decision of the Immigration Judge or the Board. See *United States* v. *Huss*, 482 F.2d 38 (2d Cir. 1973); *Bufalino* v. *I.N.S.*, 473 F.2d 728 (3d Cir.), *cert. denied*, 412 U.S. 928 (1973).

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* Petitioner's cause of action pursuant to 18 U.S.C. § 3504 in his District Court action was dismissed on the merits by Judge Owen on January 2, 1975. *Lennon* v. *United States*, 378 F. Supp. 39 (S.D.N.Y. 1975). The fact is that there was no illegal surveillance.

POINT III

The District Director's Denial of Non-Priority Status for Petitioner and the Decision to Institute Deportation Proceedings Are Not Subject to Review, But In Any Event Such Actions Were A Proper Exercise of Discretion.

In the exercise of discretion, the Service may afford non-priority status to an alien who either appears to be prima facie deportable or is already the subject of an outstanding order of deportation. The granting of such status is not provided for either by statute or regulation and is merely an informal Service policy of amelioration.

It is the respondent's position that a determination to grant or deny "non-priority" status is a matter of complete discretion and not subject to judicial scrutiny. In *Spata* v. *I.N.S.*, 442 F.2d 1013 (2d Cir. 1971), *cert. denied*, 404 U.S. 857, the alien sought review of the denial of his application for adjustment of status on the ground that a visa was not immediately available and because of his prior criminal record. The alien argued that he should be placed in a "special class" of aliens who were married to permanent resident spouses whereby the Service permitted them to remain until a visa became available. In rejecting that contention, this Court refused to inquire into the informal Service policy providing for ameliorative relief. See also *Petition of Joe Cahill*, 447 F.2d 1343 (2d Cir. 1971); *Roth* v. *Laird*, 466 F.2d 855 (2d Cir. 1971); *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968).*

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* We know of only one court that has directly ruled on whether the denial of non-priority status is reviewable. In *Riva* v. *I.N.S.*, Civil 74-1601 (D.N.J.), the Court held it to be an unreviewable exercise of discretion (unreported decision).

Lennon's application for adjustment of status was not denied as a matter of discretion but because he was statutorily ineligible for such relief on account of his conviction. Lennon now claims he should have been placed in the "special class" of aliens granted non-priority status. As in the *Spata* case, the informal policy of granting non-priority status to certain deportable aliens is a policy created by the Service based upon humanitarian factors and is not found in any statute or regulation. Hence, Lennon cannot assert a right to claim such relief. Similarly, this Court lacks jurisdiction to inquire into "the business of the District Director" in granting such relief. *Spata* v. *I.N.S., supra,* at 1015.

Moreover, even if the denial of Lennon's request for non-priority status were subject to review, it is submitted that such review of an alleged abuse of discretion is properly in the District Court. *Cheng Fan Kwok* v. *I.N.S.*, 392 U.S. 206 (1968).* In any event, it is clear that Lennon cannot demonstrate that the denial of nonpriority status was an abuse of discretion. In order to demonstrate an abuse of discretion, it must be shown that the decision complained of was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. . . ." *Wong Wing Hang* v. *I.N.S.*, 306 F.2d 715 (2d Cir. 1966).

If the Court examines Lennon's eligibility for non-priority status, it is clear that he cannot demonstrate that his case presents "appealing humanitarian factors" which would warrant such status. He was admitted to the United States under an express waiver of inadmissibility; he cannot demonstrate financial hardship to himself or anyone else if he is deported; his major business interests remain overseas; he is not a long-time resident of the United States; he is not of advanced years or in poor health; and, at the

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* This is in fact where the claim is now being litigated. *Lennon* v. *United States*, 73 Civ. 4543 (S.D.N.Y.).

time the Service denied non-priority status to Lennon, he had no children residing in the United States and his spouse was also the subject of deportation proceedings.*

Lennon also alleges that the decision to institute deportation proceedings against him was one of "selective" and "discriminatory" prosecution. Lennon points to a number of factors which allegedly support his claim of "selective" and "discriminatory" prosecution, including the failure to grant him non-priority status, the "speed" with which deportation proceedings were instituted, the "creation" of Lennon's overstay status by the Service itself when it revoked the grant of voluntary departure,** and the anonymous memorandum, the source of which Lennon's attorney refused to divulge to the Board but which Lennon has apparently

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* Several sample non-priority case decisions are annexed to petitioner's brief ostensibly to demonstrate that non-priority status has been afforded deportable aliens with far more serious conviction records than Lennon's. Without conceding that such records are properly before this Court on this petition for review, respondent would point out that in each of the sample cases the deportable alien had much greater equities than Lennon which resulted in the favorable non-priority decision. In every case the alien was the spouse of a United States citizen and had citizen children; in two of the five cases the alien was a lawful permanent resident; in one case the alien had resided in the United States from the age of two years; in two cases the aliens were in poor health and of advanced age; and the alien with the most extensive, and undeniably serious, record had a United States citizen spouse, two minor citizen children and both of his parents were citizens.

It should be noted that petitioner was able to annex only five cases out of approximately 1,800 decisions which were provided to him which he regards as being helpful to his position.

** Lennon's overstay status was not "created" by the Service. Rather, Lennon became an overstay when he failed to depart by the time his authorized visit expired on February 29, 1972. The grant of a period of voluntary departure did not make Lennon any less deportable; it was merely a privilege accorded Lennon to avoid formal deportation proceedings.

concluded is a memorandum of the C.I.A., although neither the memorandum itself nor Lennon demonstrates any basis such a conclusion.

The decision of the Attorney General to commence deportation proceedings is a matter entrusted solely to his sound discretion and is similar in nature to the power of a criminal prosecutor in deciding whether to prosecute a given case and, as such, judicial scrutiny is generally precluded.

In *United States* v. *California*, 332 U.S. 19 (1947), the Supreme Court noted that it was undisputed that, pursuant to 5 U.S.C. §§ 291 ad 309, Congress had conferred very broad authority on the Attorney General to institute litigation in order to safeguard government rights and properties. The Court held that in the absence of a statute limiting the authority, the courts will not interfere with the discretion of a government agency in instituting legal proceedings. Similarly, under the broad grant of authority contained in Section 103(a) of the Act, 8 U.S.C. § 1103(a), the Attorney General is charged with the administration and enforcement of the immigration laws. Pursuant to this statute, Congress has chosen to empower the Attorney General with broad discretionary powers to implement and enforce these laws. *Royalton College, Inc.* v. *Clark*, 295 F. Supp. 365 (D.C. D. Vt. 1969); *Marcello* v. *Attorney General*, 347 F. Supp. 898 (D.C. D.C. 1972). Under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), an alien is deportable if he is in the United States without authority. Thus, as petitioner has not offered any evidence to show that he was given permission to remain in the United States beyond February 29, 1972, the institution of deportation proceedings is within the absolute discretion of the Attorney General and beyond the limits of this Court's jurisdiction.

Additionally, the Courts have uniformly refrained from inquiring into the motives for initiating administrative action

and have limited their inquiry solely to an examination of the ultimate findings of the administrative body.* In such a case where the plaintiff complained that the administrative action was discriminatorily commenced, the Supreme Court, in rejecting the argument, stated that if the administrative order "is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it." *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145 (1937). See also, *Fahey* v. *Mallonee,* 332 U.S. 245, 256 (1947); *Home Loan Bank Board* v. *Mallonee,* 196 F.2d 336 (9th Cir. 1952).

Moreover, the authority of the District Director in deciding whether to commence deportation proceedings can be somewhat analogized to that of a criminal prosecutor although deportation is a civil action and not thought of as punishment. See, *Oliver* v. *United States Dept. of Justice, supra,* at 3569.** In this area of prosecutorial discretion, it has long been settled that the decision to investigate, arrest or prosecute are matters entrusted solely to the discretion of the prosecutor's office, over which the Courts will not interfere. *Confiscation Cases,* 74 U.S. (7 Wall) 454 (1868); *Milliken* v. *Stone,* 16 F.2d 981 (2d Cir. 1927); *Peck* v. *Mitchell,* 419 F.2d 575 (6th Cir. 1970); *Powell* v. *Katzenbach,* 359 F.2d 235 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906, *rehearing denied,* 384 U.S. 967 (1966); *Moses* v. *Katzenbach,* 342 F.2d 931 (D.C. Cir. 1965), *affirming Moses* v. *Kennedy,* 219 F. Supp. 762 (D.D.C. 1963); *United States* v.

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* We also note that it has always been the policy of the Board of Immigration Appeals not to inquire into reasons for initiating deportation action but only to address the ultimate finding of whether deportability has been established by clear, convincing and unequivocal evidence. *Matter of Geronimo,* 13 I & N 680, 681 (Board of Immigration Appeals, March 5, 1971).

** See also *Woodby* v. *I.N.S.,* 385 U.S. 276 (1966); *Harisiades* v. *Shaughnessy,* 342 U.S. 580 (1952); *Galvan* v. *Press,* 347 U.S. 522 (1954); *Carlson* v. *Landon,* 342 U.S. 524 (1952); *Santelieses* v. *I.N.S.,* 491 F.2d 1254 (2d Cir. 1974).

Cox, 342 F.2d 167 (5th Cir.), *cert. denied sub nom. Cox* v. *Hauberg*, 381 U.S. 935 (1965); *Goldberg* v. *Hoffman*, 225 F.2d 463 (7th Cir. 1955); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961). Indeed, the established rule is that a prosecutor's discretion is absolute. *Smith* v. *United States*, 375 F.2d 243, 247 (5th Cir. 1967), *cert. denied*, 389 U.S. 841. Additionally, this Circuit concluded that in the absence of a statute or regulation, "the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary." *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973).

In a recent decision of this Circuit, the Court was confronted with a charge of discriminatory prosecution in a criminal case where the defendant was accused of holding a union office in violation of 29 U.S.C. § 504. In support of his claim of selective prosecution, the defendant alleged that there had been only three prosecutions under this statute since 1969. There, the Court set forth the criteria for analyzing a charge of discriminatory prosecution as follows:

> "To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.' [Citations omitted]." *United States* v. *Berrios*, 501 F.2d 1207 (2d Cir. 1974).

Even if such criteria were to be applied in a deportation case, it is clear that the petitioner herein could not sustain his burden. With respect to the first element of this criteria it is beyond doubt that the petitioner was not singled out for "prosecution." The records of the Immigration and Naturalization Service for the fiscal year ending June 30, 1972, show that a total of 3,375 aliens were deported for remaining longer in the United States than authorized, and for the year ending June 30, 1973, a total of 3,008 such aliens were deported for that same reason. In addition, for the years 1972 and 1973, a total in excess of 58,000 aliens were required to depart the United States without the institution of deportation proceedings for having remained in this country without authority.

Additionally, the petitioner cannot claim that deportation proceedings were arbitrarily commenced against him because of his conviction for possession of marihuana. As the records of the Immigration and Naturalization Service demonstrate, for the past two fiscal years over seven hundred aliens were ordered deported for violation of narcotics laws. Although the Service does not keep records based on the particular narcotic offense involved, it is believed that the vast majority of such cases were based on convictions for possession of marihuana. Indeed, this Circuit has upheld the deportation and exclusion of an alien on the ground of his conviction for possession of marihuana. In *Grumbacher* v. *United States Department of Justice* (unreported, Docket No. 72-1063, decided July 13, 1972), the alien, a lawful permanent resident of the United States, was arrested in Florida and charged initially with vagrancy. At the police station and prior to incarceration, a small quantity of marihuana was found on his person and an additional charge of possession of narcotics was made against him. The alien, upon advice of counsel, pled guilty to possession of marihuana and received a fine of $500.00. Thereafter, the alien left the United States and reentered after a brief sojourn abroad. Deportation proceedings were

then initiated against him on the ground that he was deportable under Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1), as an alien excludable upon entry because of his marihuana conviction.* The alien was found deportable as charged and the order of deportation was affirmed by this Court which dismissed his petition for review from the bench. See also *Van Dijk* v. *Immigration and Naturalization Service*, 440 F.2d 798 (9th Cir. 1971); *Gonzalez de Lara* v. *United States*, 439 F.2d 1316 (5th Cir. 1971).**

With respect to the second element of this twofold criteria, the petitioner is unable to demonstrate invidious discrimination or bad faith on the part of the Government. He had twice been granted waivers of excludability under Section 212(d)(3)(A) of the Act, 8 U.S.C. §1182(d)(3)(A), and had been granted four discretionary extensions of his lawful stay in this country. Since petitioner did not seek any further extension of his temporary stay and remained beyond the period of his authorized admission, the District Director of the Service properly commenced deportation proceedings.

Moreover, even if this Court were to find that it had jurisdiction to examine the District Director's decision to institute proceedings, it is clear that his decision cannot be deemed an abuse of discretion. *Vassiliou* v. *District Director of Immigration and Naturalization Service*, 461 F.2d 1193, 1195 (10th Cir. 1972); *Marcello* v. *Attorney General*, *supra*, at p. 901. In order for an abuse of discretion to exist, it must be shown that the decision complained of was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis . . . ." *Wong Wing Hang* v. *Immigration and Naturalization Service*, 306 F.2d 715, 719 (2d Cir. 1966). For the reasons previously enumerated, the decision to com-

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* Section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23).

** Cf. *Oliver* v. *U.S. Dept. of Justice*, *supra*.

mence deportation proceedings in this case cannot be held to constitute an abuse of discretion.

In the absence of evidence that the Government is "dusting off" some statute which has never (or hardly) been used for prosecution *coupled with* a constitutionally impermissible motive, there can be no claim of discriminatory prosecution. If there has been no singling out for prosecution under an unused statute, motive becomes irrelevant. If the contrary were the case, one can posit closely analogous hypotheticals in the civil context which defy distinction. Thus, presume that a prominent nursing home operator has long been receiving Medicare overpayments. At the same time he has been an outspoken political opponent of the existing political administration. A federal official who personally dislikes the operator and is in a large part motivated by political considerations based upon the nursing home operator's legitimate first amendment protected activities institutes an investigation and administrative proceedings against the outspoken operator and other operators as well to recover overpayments. It can hardly be the law that the proceeding is illegal as to the politically active operator and not as to the others. We believe it is not the law that dissent warrants immunity.

Accardi v. *Shaughnessy,* 347 U.S. 260 (1954), and *Bufalino* v. *Kennedy,* 322 F.2d 1016 (D.C. Cir. 1963), are patently distinguishable from the present matter.* In those cases, the aliens conceded deportability and attacked only the denial of their applications for discretionary relief on the ground that statements of the Attorney General with regard to them evidenced that their cases were prejudged. In those cases the courts concluded that discretion had not been properly exercised and remanded the actions to the

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* Although not cited by petitioner in his brief, these cases were heavily relied upon by the District Judge in his opinion of January 2, 1975. *Lennon* v. *United States, supra.*

lower courts. In *Accardi,* the Supreme Court viewed the issue as "whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto." 347 U.S. at p. 265. In the present case, the petitioner cannot look to any statute or regulation within which to seek shelter. His ultimate remedy rests in this Court as to whether the finding of deportability is supported by clear, unequivocal and convincing evidence. Section 106a of the Act, 8 U.S.C. § 1105a(a); *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (1966). Additionally, the petitioner's application for adjustment of status under Section 245 of the Act, 8 U.S.C. § 1255, unlike *Accardi* and *Bufalino, supra,* was not denied in the exercise of discretion but rather because the petitioner was deemed statutorily ineligible for the relief on the basis of his conviction for possession of marihuana. *Foti* v. *Immigration and Naturalization Service,* 375 U.S. 217 (1963); *Cheng Fan Kwok* v. *Immigration and Naturalization Service,* 392 U.S. 206 (1968); *Panagopoulos* v. *Immigration and Naturalization Service,* 434 F.2d 602 (1st Cir. 1970).

POINT IV

Petitioner Is Not Being Deported Because of His Political Views And Associations.

Lennon's contention that he was "selected" for deportation because of his political beliefs and associations and thus in violation of his First and Fifth Amendment rights has no merit. The Service admitted Lennon into this country temporarily and with a discretionary waiver of his statutory ineligibility for a visa. He was admitted primarily to appear with his wife in custody proceedings relating to his wife's child from a former marriage. Lennon was admitted for a stated period of time and he subsequently applied for and was granted three extensions of his temporary stay. The last of these extensions expired on Feb-

ruary 29, 1973. Lennon did not request any further extension of his stay. Consequently, his presence in the United States was in violation of law and hence, like any other overstay non-immigrant, Lennon became deportable. He was advised on March 1, 1972 that he could effect his voluntary departure by March 15, 1972 without the institution of deportation proceedings. Lennon did not seek any extensions of his temporary stay but rather, on March 3, 1972, submitted a visa petition, the first step toward obtaining an immigrant visa and permanent resident status in the United States.

Lennon makes much of the fact that his authorized stay expired on February 29, 1972 and that the following day, March 1, he was advised of his illegal status and granted a period of voluntary departure before deportation proceedings would be instituted. Lennon contends that such precipitous action by the Service in his case indicates some sort of "selective prosecution." Yet Lennon conveniently overlooks two factors: (1) most overstay nonimmigrants are concededly not of Lennon's publicized stature and become anonymous members of the communities in which they settle until apprehended by the Service, at which time deportation proceedings are usually immediately instituted, usually without a chance to effect voluntary departure prior to the institution of proceedings; and (2) there had been much correspondence and discussion between the Service and Lennon concerning his stay in the United States so that Lennon had constantly brought his presence to the attention of the Service. Any information concerning Lennon which was in the Service files did not alter the fact that Lennon was an overstay who was both conspicuous and deportable. To institute deportation proceedings speedily is hardly grounds to complain. Usually the criticism is that the Service acts too slowly with respect to illegal aliens.

Lennon further contends that to deport him for "wholly innocent conduct abroad" is a violation of the due process

clause of the Fifth Amendment and a form of cruel and unusual punishment under the Eighth Amendment. It is well-settled that an alien is entitled to due process in proceedings instituted to determine his deportability. Lennon apparently does not suggest that he was denied due process in the deportation proceeding. Rather, he contends that he is being deported for "*past* conduct, in a *foreign* country, and [on] a record establishing a total absence of *mens rea*," and that to deport a "highly respected figure with substantial business associations in the United States" under those circumstances violates the Fifth Amendment. Lennon's contentions are based on a series of less than accurate premises.

Initially, in order to put this issue in proper perspective, Lennon is not being deported on account of his narcotics conviction. He has been found ineligible for adjustment for status since the conviction renders him inadmissible to the United States. Concededly, the finding of inadmissibility precludes his adjustment of status and thus his deportation as an overstay nonimmigrant must be effectuated.

Secondly, Lennon appears to take the position that a conviction in a foreign country which occurred six years ago should not, and indeed cannot, be a ground on which he may be found inadmissible to the United States. Such an argument ignores the plain meaning and intent of the exclusion provisions of the Act, 8 U.S.C. § 1182. If the exclusion provisions, which by their very terms are applicable to aliens seeking to enter the United States, were read to preclude foreign convictions which occurred several years prior to the application for admission, the statute would be meaningless. It is solely for Congress to determine the standards of admissibility into this country. Congress has introduced no time limit into the immigration laws which would make a criminal conviction stale. It is submitted that the Constitution does not impose such limitations upon an essentially political decision. Cf. *Noel* v. *Chapman, supra; Oliver* v. *U.S. Department of Justice, supra.*

Lennon seeks to buttress his claim that to preclude his continued residence in the United States on the basis of his 1968 conviction in Great Britain would violate the due process clause of the Fifth Amendment by the claim that his conduct upon which the conviction was based was "wholly innocent" and that the record establishes a total absence of *mens rea*. The respondent has shown that Section 212 (a)(23) does not require a finding of *mens rea* and that *mens rea* is in fact required by the British statute under which Lennon was convicted. Thus, the record of conviction, which Lennon admitted related to him, is conclusive with respect to the conviction. See *Raesano* v. *Immigration and Naturalization Service*, 377 F.2d 971 (7th Cir. 1966), *vacated and remanded on other grounds*, 377 F.2d 975. In fact, the record indicates that Lennon's conduct may not have been as "wholly innocent" as he would have the Court believe and that, in fact, *mens rea* was not totally absent from the record (T. 30, p. 2). In any event, his claim of "innocence" was waived by his plea of guilty.

POINT V

The British Rehabilitation of Offenders Act Does Not Effectively Expunge Petitioner's Conviction For Purposes of the Immigration and Nationality Act And A Remand Of the Case Would Serve No Purpose.

Under the Immigration and Nationality Act, expunction of a narcotics conviction does not affect the validity or finality of that conviction for immigration purposes. The only exception to this general rule is the expunction of a narcotics conviction under the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq., and similar state statutes for youthful offenders.

In *Garcia-Gonzalez* v. *I.N.S.*, 344 F.2d 804 (9th Cir. 1965), *cert. denied*, 382 U.S. 840, the Ninth Circuit faced

squarely the issue whether the setting aside of a plea of guilty, entry of a plea of not guilty, and dismissal of the information pursuant to California law, "wiped out" or "expunged" the conviction upon which the deportation order rests to the extent that the order must be re-considered. It held that the state procedure did not have such an effect. The Ninth Circuit has consistently followed the principle laid down in *Garcia-Gonzalez, supra*. *E.g., Chabolla-Delgado* v. *I.N.S.*, 384 F.2d 360 (9th Cir. 1967), *cert. denied*, 393 U.S. 865; *Brownrigg* v. *I.N.S.*, 356 F.2d 377 (9th Cir. 1966); *Kelly* v. *I.N.S.*, 349 F.2d 473 (9th Cir. 1965), *cert. denied*, 382 U.S. 932; *Ramirez-Villa* v. *I.N.S.*, 347 F.2d 985 (9th Cir. 1965), *cert. denied*, 382 U.S. 908. It has also held that a narcotics conviction expunged under Section 176.225, Nevada Revised Statutes, which is similar to the California statute, remains a conviction for deportation purposes. *Tsimbidy-Rochu* v. *I.N.S.*, 414 F.2d 797 (9th Cir. 1969).

Moreover, the Fifth Circuit has followed the Ninth Circuit's reasoning in construing Section 7 of the Texas Adult Probation and Parole Law, which contains provisions similar to those in the California and Nevada statutes. The Court, referring to the Texas statute, said:

> "Rather than a statute that completely erases the conviction, we believe the provision in controversy is accurately characterized as one that rewards a convicted party for good behavior during probation by releasing him from certain penalties and disabilities otherwise imposed upon convicted persons by Texas law. Secondly, we believe that the sanctions of 8 U.S.C. § 1251(a)(11) are triggered by the fact of the state conviction. The manner in which Texas chooses to deal with a party subsequent to his conviction is simply not of controlling importance insofar as a deportation proceeding—a function of federal, not state, law—is concerned. We agree with the Ninth Circuit

> that [i]t would defeat the purposes * * * [of federal law] if provisions of local law, dealing with rehabilitation of convicted persons, could remove them from the ambit of [federal penal enactments] * * * We do not think Congress intended such a result." *Gonzalez de Lara* v. *United States,* 439 F.2d 1316, 1318-1319 (5th Cir. 1971).

Until recently, narcotics convictions have also been held to be final for deportation purposes when the offenses are committed by persons who are treated under state law as youthful offenders. In an unreported decision the Board of Immigration Appeals affirmed the deportation order against an alien who at age nineteen had been convicted in California of unlawful possession of heroin and marijuana and had been placed in the custody of the Youth Authority. The Board held that he was deportable on the basis of the conviction notwithstanding a judicial order of discharge under Section 1772 of the California Welfare and Institutions Code, which is similar to the procedure under Section 1203.4 of the California Penal Code. The Ninth Circuit affirmed the Board's decision. *De la Cruz-Martinez* v. *I.N.S.,* 404 F.2d 1198 (9th Cir. 1968), *cert. denied,* 394 U.S. 955.

In considering the effect of the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. on a narcotics conviction in *Mestre-Morera* v. *I.N.S.,* 462 F.2d 1030 (1st Cir. 1972), the First Circuit held that 18 U.S.C. § 5021, pursuant to which the conviction had been expunged, "clearly contemplates more than a 'technical erasure'; it expresses a Congressional concern, which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions." *Mestre-Morera, supra,* at 1032. The First Circuit distinguished its case from the Ninth Circuit cases on the ground that the Ninth Circuit's cases involved expunction of *state* convictions under an unusual state procedure.

On the basis of *Mestre-Morera, supra,* the Service has reversed its former position, as reflected in *De la Cruz-Martinez, supra,* and has extended the First Circuit's ruling on the federal statute to similar state procedures for youthful offenders. See *Matter of Andrade,* Interim Decision No. 2276, decided by the Board on April 5, 1974.*

In addition to contesting the Board's finding of deportability and ineligibility for adjustment of status, Lennon also raises the question of the effect of the British Uniform Rehabilitation of Offenders Act ** upon the denial of his application for adjustment of status. Lennon contends that, at the very least, the case must be remanded to the Board for consideration of the effect of the British statute. It is the respondent's position that the British statute does not have the effect claimed by Lennon and that a remand would serve no useful purpose.

Lennon's conviction clearly falls within the terms of the British statute, both with respect to the nature of the conviction and the sentence imposed. It is equally clear, however, that the statute does not completely wipe out or expunge the conviction. As the title of the statute indicates, it is designed to relieve a person from adverse effects which may flow from a conviction. Its benefits are extended on the basis of the person's conduct for a certain period of time after the conviction (App. p. 408-409). Thus, the Act con-

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* The Board's prior decision in the *Andrade* case, Interim Decision 2205, decided May 31, 1973, followed the Ninth Circuit's rule enunciated in *De la Cruz-Martinez, supra.* The Board's order was affirmed by the Ninth Circuit in an order entered August 15, 1973. Andrade then petitioned the Supreme Court for certiorari. As a result of the Board's order of April 5, 1974 the Supreme Court granted the petition, vacated the Ninth Circuit's judgment and remanded the case with directions to dismiss it as moot. 416 U.S. 765 (1974).

** The British statute is reproduced at page 403 of petitioner's Appendix. The Act becomes effective on July 1, 1975.

templates that the person remains a convicted person but, if the conditions for rehabilitation are met, the conviction, for many purposes, *but not for all purposes,* becomes "spent". (See Preliminary Note and Sections 1 and 4 of the Act, App. p. 403-408).

The Act clearly states that even if a conviction becomes "spent," it may continue to be used for appropriate purposes. For example, Sections 7 and 8 of the Act refer to numerous instances wherein the "spent" conviction may be introduced into evidence or may be pardoned or quashed by the monarch. Surely the fact that a "spent" conviction may be pardoned or quashed is a sufficient basis to preclude a finding that Lennon's conviction will be expunged for all purposes on July 1, 1975 by the terms of the Act. Moreover, the Act makes foreign convictions subject to the rehabilitation process (App. p. 404, Sec. 1(4)(a)). For all of these reasons, that process cannot be considered as affecting the validity of the conviction itself. Thus, although the British statute is much more comprehensive than some state statutes which "expunge" convictions, the British statute has some similar effects in that certain consequences of the conviction are removed.

Lennon relies heavily on the change in Service policy, as a result of the *Mestre-Morera* decision and as reflected in the *Andrade* case, relating to aliens convicted of narcotics offenses and sentenced pursuant to the Federal Youth Corrections Act. Such reliance is totally misplaced. First, Lennon's conviction occurred in a foreign country and there is no claim made, nor indeed could one be made, that the conviction was expunged pursuant to a statute similar to the Federal Youth Corrections Act. Instead, Lennon argues that the British rehabilitation statute has the same purpose and effect as the Federal Youth Corrections Act and, thus, the Service may not use his 1968 conviction as a basis for finding him inadmissible to the United States. A comparative reading of the two statutes clearly demonstrates

that under the British Act Lennon's conviction is considered "spent" while the Federal Youth Corrections Act provides that a conviction under that statute shall be "set aside" automatically upon satisfaction of the statutory prerequisites and that a certificate setting aside the conviction shall issue to the youth offender. Lennon's case differs from the *Mestre-Morera* and *Andrade* cases in another important respect: He was convicted in a foreign court and he relies upon a foreign statute to remove the effects of that conviction. He can take no comfort from these facts, however. It is well-settled that a foreign pardon or amnesty is ineffective to prevent deportation or exclusion. *Consola* v. *Karnuth*, 108 F.2d 178 (2d Cir. 1939); *Palermo* v. *Smith*, 17 F.2d 534 (2d Cir. 1927); *Sohaiby* v. *Savoretti*, 195 F.2d 139 (5th Cir. 1952); *Mercer* v. *Lence*, 96 F.2d 122 (10th Cir. 1938), *cert. denied*, 305 U.S. 611; *Weedin* v. *Hempel*, 28 F.2d 603 (9th Cir. 1928). The British Rehabilitation of Offenders Act of 1974 can certainly have no greater effect than the act of a foreign legislature in granting an amnesty.

Such reasoning has particular force in a narcotics case since, pursuant to Section 241(b) of the Act, 8 U.S.C. § 1251(b), even a pardon granted in the United States for a narcotics offense committed here has no effect upon a deportation order entered pursuant to Section 241(a)(11). Were the British statute given the effect Lennon seeks, a greatly inequitable result might be achieved. For example, an alien who is a lawful permanent resident and who is convicted in the United States of a narcotics offense under either a state or federal statute (other than an alien sentenced pursuant to the Federal Youth Corrections Act or a similar state statute) and who received a pardon from the President or a state governor or on whose behalf a recommendation against deportation was properly made by the sentencing judge, would not be saved from deportation by such pardon or judicial recommendation against deportation. 8 U.S.C. § 1251(b). Yet, if the Court accepts petitioner's contention, Lennon, who has never been a lawful

permanent resident and was only permitted to enter the United States temporarily after being granted discretionary waivers of inadmissibility because of his conviction, would not be excludable from the United States because of his conviction and could then proceed to obtain lawful permanent residence. It is submitted that such an illogical result could not have been intended by Congress and should not be permitted by this Court.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING CA 74-2189

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 3rd day of July 19 75 she served 2 copies of the within respondent's brief

by placing the same in a properly postpaid franked envelope addressed:

Leon Wildes, Esq.,
515 Madison Ave.
NY NY 10022

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

3rd day of July 19 75

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977